SUBRAN KUNHIKUTTAN

v.

ALADATH PUTHAM VEETAL MOIDUTTY

HIGH COURT MALAYA, TEMERLOH
AZHAR MA'AH JC
[CIVIL APPEAL NO: 12-9-96]
4 MARCH 1997

CIVIL PROCEDURE: *Striking out - Subordinate Courts Rules 1980, O. 14 r. 21*

CIVIL PROCEDURE: *Appeal - Record of appeal - Additional appeal records - Notes of evidence, grounds of decision, memorandum of appeal - Out of time - No leave obtained - Order 49 r. 6 of the Subordinate Courts Rules 1980*

The plaintiff filed an action in the Sessions Court for breach of contract. The claim was struck off on the application of the defendant under O. 14 r. 21. The plaintiff appealed. Before the hearing of the appeal the defendant raised a preliminary objection that the additional record of appeal filed by the plaintiff had been filed out of time. The original appeal record was therefore incomplete and defective and the appeal could not proceed.

Counsel for the plaintiff contended that the documents comprising the additional appeal record, ie, the notes of evidence, grounds of decision and memorandum of appeal were no longer imperative by virtue of O. 49 r. 6 of the Subordinate Courts Rules 1980 as amended in 1993. The Court could choose not to accept the additional appeal record and still hear the appeal.

Held:

[1] The intent of O. 49 r. 6, of the Subordinate Courts Rules 1980 is clear, ie, to prevent delay by abridging the appeal process. The rule is specially designed for interlocutory appeals. The three documents namely the notes of evidence, grounds of decision and memorandum of appeal are therefore no longer imperative.

[Preliminary objection overruled; appeal to proceed.]

Cases referred to:
Syarikat Kayu Bersatu Sdn Bhd v. UMW (Sarawak) Sdn Bhd [1995] 1 CLJ 113 ***(refd)***
Yupaporn Seangarthit v. Allen Campbell Webb [1996] 1 CLJ 43 ***(refd)***
Vong Ban Hin v. Laksamana Realty Sdn Bhd [1996] 4 CLJ 852 ***(refd)***
Re Cnaic and Anor Ex parte Zietsek [1944] SR (NSW) 360 ***(refd)***

Sussex Peerage Claim [1884] II CI FIM 85 ***(foll)***
Vickers Sons and Maxin Ltd v. Evan [1910] AC 444 ***(foll)***
H Rubber Estate Bhd v. Director General of Inland Revenue [1979] 1 MLJ 115 ***(foll)***
Pembinaan Nadzri Sdn Bhd v. Koon Hoe & Co Sdn Bhd [1996] 2 CLJ 1039 ***(foll)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 14 r. 21, O. 49 rr. 2(1), (4), 3(2), 6(2), (3)

Other source referred to:
Interpretation of Statutes, Maxwell

For the appellant - Bastian Vendargon; M/s Vendargon & Partners
For the respondent - D'Cruz; M/s AKJ D'Cruz

JUDGMENT

Azhar Ma'ah JC:

The plaintiff/appellant filed an action in the Sessions Court for damages for an alleged breach of contract. On the application of defendant/respondent under O. 14 r. 21 of the Subordinate Court Rules 1980 (SCR) the plaintiff/appellant claim was struck off. Against that order, the plaintiff/appellant now appeals.

Before the hearing of appeal, Counsel for the respondent raised a preliminary objection with regard to the filing of Rekod Rayuan Tambahan by the appellant. This RRT which contained notes of evidence, grounds of decision and memorandum of appeal was filed on 1 August 1996. The notice of appeal was filed on 18 June 1996. The ground for the Counsel's objection was that no leave was obtained prior to the filing of the RRT as it was already out of time. It was contended further, without these three documents the appeal record that was filed on 6 July 1996 was incomplete, therefore defective. Thus this appeal is not properly brought before this Court.

Counsel for the appellant held a different view. It was contended that the filing of these three documents, after 1993 is no longer a must and imperative. The Court can proceed to hear the appeal without them. His purpose of filing the RRT was merely to assist this Court in the hearing. The Court can choose not to accept this RRT, but the appeal can still be disposed off.

Obviously the objection by the respondents Counsel stemmed out from the amendment P.U (A) 193/93 ie, the admission of r. 6 into O. 49 of the SCR which reads as follows:

> 6(1) Notwithstanding anything contained in this Order, an appeal shall lie to Judge-in-Chambers from any decision made by the Court other than a decision made after trial.

(2) The appeal shall be brought by filing a notice of appeal in form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.

(3) Within three weeks after filing of the notice of appeal, the appellant shall file the record of appeal in the High Court, and the record shall contain copies of:

a) The application for the decision.

b) The statement of claim, and where defence has been filed, the statement of defence.

c) All affidavits filed in support of or in opposition to the application, and

d) The decision appealed from,

but shall not include the notes of evidence, the grounds of judgement or any memorandum of appeal.

Counsel for the respondent in support of his objection cited the case of *Syarikat Kayu Bersatu Sdn. Bhd. v. UMW (Sarawak) Sdn. Bhd.* which later received the approval of the Court of Appeal in its case of *Yupaporn Seangarthit v. Allen Campbell Webb.*

It is to be noted that the observation made on *Syarikat Kayu Bersatu* case by the Court of Appeal in *Yupaporn* case were not made in the course of hearing an appeal, but while dismissing an application for leave to appeal. Augustine Paul JC in the case of *Vong Van Hing v. Laksamana Realty Sdn. Bhd.* [1996] CLJ JT (25) made reference to a NSW, case ie, *Re Cnaic and Anor. Ex parte Zietsek* [1944] SR (NSW) 360, where Jordan CJ said that where the High Court made no order, except to refuse leave to appeal in an application for leave to appeal it is open to question whether, in strictness any observation made by the Court as to any question of law or fact involved amount to more than a dicta.

Further, in *Yupaporn* case, refusal of leave to appeal against a decision of the High Court by the Court of Appeal, gives the High Court judgment the same authority as any other unappealed judgment of the High Court.

In a House of Lords case *Gilbert Ash (Northern) Ltd. v. Modern Engineering (Bustol) Ltd.* Lord Diplock had this to say:

> Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appeal against. That judgment carried the same authority as any other unappealed judgment of the Court of Appeal neither more nor less.

It therefore follows that the *Syarikat Kayu Bersatu* decision and the decision made in the *Yupaporn* case at the High Court level does not enjoy any elevated status as a result of the observation made by the Court of Appeal.

Coming back to sub-r. (3) of r. 6, I do not see any reason why one has to be so reluctant to give literal and simple meaning and interpretation to this provision. The way I see it the intention of the Rules Committee in introducing this sub-r. (3) is very clear ie, none other than abridging the appeal process with the objective of speedy disposal of appeal against any interlocutory orders so that the hearing of the case proper will not be hampered and can be disposed off without further delay. If the process of appeal against interlocutory orders has to be the same with that of appeals against order after full trial inevitably there will be much further delay in the disposal of the case proper as late coming of notes of evidence and grounds has been identified as one of the contributing factors to the delay in compiling appeal records.

In the case *Sussex Peerage Claim* [1884] II CI FIM 85, Tindal CJ said:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense ... but if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting that intention to call in aid the ground and cause of the making of the statute.

Further in the case of *Vickers Sons and Maxin Ltd. v. Evan* [1910] AC 444, Lord Loreburn LC said that:

> My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing against Acts of Parliament, or of providing by judicial construction of what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but it does say ...

The Court will give the "Ordinary, plain and natural meaning of the words contained in a statute. This is what is known as the "plain meaning rule".

In *H. Rubber Estate Bhd. v. Director General of Inland Revenue* [1979] 1 MLJ, 115, Gill CJ (Malaya) said that:

> the universal rule in construing status, as in construing all other written instruments, is that the grammatical ordinary sense of the word is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument ...

In Maxwell's *interpretation of statutes*, it is stated as follows:

> The underlying principle is that the meaning and intention of statute must be collected from the plain and unambiguous expression used therein rather than from any notion which may be entertained by the Courts as to what is just and expedient ...

Applying the above principles, and reading straight into the provision of sub-r. 3, I find it crystal clear that the intention of this subsidiary legislation is to completely dispense with the need for these three documents as part of the record of appeal, bearing in mind that the introduction of this additional avenue for appeal would undoubtedly result in tremendous increase in the workload for the subordinate Court officers.

As can be seen, under r. 2(1) of O. 49 SCR appeals to the High Court shall be brought by giving notice of appeal in Form 140. A similar provision is introduced under r. 6(2) of O. 49, for appeal against any decision made by Court other than decision made after a full trial. Form 140 is also to be used under r. 2 (4) of O. 49, as soon as the certified copy of notes of evidence and grounds of judgment are ready, the appellant will be notified by Court using Form 141. Upon receiving the notice, the appellant shall than file memorandum of appeal. However, it is to be noted that there is no corresponding provision to be found under r. 6 of O. 49. Instead sub-r. 3 specifically excludes the three documents from the appeal record. This is a specific provision with a definite purpose. Applying the principle of *generalibus specialia derogant* as Abdul Kadir Musa (JC as he than was) did in the case of *Pembinaan Nadzri Sdn. Bhd. v. Koon Hoe & Co. Sdn. Bhd.* [1996] 2 CLJ 1039. I wholeheartedly agree that r. 6 is designed specially for appeals against interlocutory orders with a definite purpose of cutting short time taken in preparing appeal records, as I have said earlier preparation of notes of evidence and grounds of decision will take some time. This means the operation of rr. 2(4) or 3(2) of O. 49 must necessarily be excluded. Otherwise the introduction of r. 6 will be an exercise in futility.

To further fortify my points above let us see the rationale of introducing r. 6 into O. 49. In an appeal against order made after full trial, an appeal Judge has inevitably to rely heavily on the notes of evidence as well as the trial Judge's grounds of judgment as witnesses were called during the trial and the appeal Judge do not have the advantage of hearing them. Therefore he can only decide on the appeal based on the notes of evidence and the trial Judge's grounds of judgment. The appellants memorandum of appeal is also prepared based on the notes of evidence and grounds of judgment. Understandably, without these three documents it is difficult to see how the appeal Judge can proceed to hear the appeal.

In contrast, in hearing of interlocutory application no witnesses are called. Orders are made by the Court below based on affidavits filed in support of or in opposition to the application. Disposal of appeals are by way of rehearing. The appeal Judge will be looking at the same affidavits and documents that were presented before the Court below. The appeal Judge will decide on the strenght of the presentation made by the parties before him. This means the Judge will exercise his own discretion as though the matter was before him for the first time unfettered by the previous exercise of the lower Court's decision. Therefore the appeal Judge is free to dispose off an appeal that comes before him without having to make any reference to the lower Court's notes of evidence and grounds of decision. In short, the three documents which are in issue are no longer imperative. With this note, the objection raised by the Counsel for the respondent is overruled with cost, and the appellants will proceed with this appeal.

Reported by Pushpa Nair